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I. — THE PLEDGE-IDEA: A STUDY IN COMPARATIVE LEGAL IDEAS.

THE place in legal science of the subject commonly spoken of as Comparative Law is not easy to settle. Its settlement depends more or less on the analysis and grouping that one adopts for the various parts of legal science as a whole. Leaving for another occasion the question of classification from the point of view of jurisprudence, it has seemed worth while to attempt to illustrate here the significance of one view of the scope of the subject. The choice of topic for illustration was determined merely by casual circumstances creating an interest in this particular topic, and by the accessibility of material.

The pledge-idea — briefly expressed, that of collateral security — is familiar enough in modern law. But it is distinctly an idea of modern times. The various known systems of law recognize it with various degrees of definiteness, according to the social stage which their development has reached, or had reached when arrested. The idea familiar to us has grown, in the history of the law, out of a very different one. The attempt here will be to go back to the primitive notion of that transaction, and notice its development and the traces it has left on the law as handed over to us in its later stages.

To realize the root notion of the transaction, we may put ourselves in the place of the primitive traders and try to reconstruct the conditions of their traffic. In the ordinary case of barter between passing travellers, or at the monthly or half-yearly markets, A will

find what he wants in B's hands, but the equivalent which A has to give may be either not to B's liking in kind or not of proper value They must and will make a provisional trade or payment, B taking something of A's that will induce him to sell, but A having the privilege of substituting later an equivalent not now available. So, too, when A has injured B, and B seeks self-redress by his own hands, A may be able to buy off B by handing over whatever he has that is available, but subject to the right of subsequent substitution of something more nearly an equivalent. In short, all transactions of the sort must be cash transactions, *because there is no credit.* We know that the absence of credit is a feature of the times, both from the ethnological study of primitive surviving communities, and from the fact that credit presupposes a use, legal or moral (customary), of the force of the community, which is wholly inconsistent with the private redress notions of primitive times.[1] One must try, moreover, to realize this absence of credit subjectively; i. e. to remember that the seller or claim-holder is not willing to go away from the spot leaving the matter unsettled, and trusting to (crediting) the other's future action; he is going to get something then and there in satisfaction, and the best allowance that the would-be borrower or the tortfeasor can obtain is that the settlement shall be provisional in his favor, i. e. the *res* given over shall be open to future redemption. The cardinal feature of the transaction is, then, that the party whom we should call the creditor goes away with nothing left to claim, though the (as we call him) debtor has a right of redemption against the other.

We shall be better able to appreciate the primitive state of mind if we remember that in at least four important bodies of law and language the primitive word for the ideas of "pledge," "bet" (or "forfeit"), and "promise," was substantially the same. In the Scandinavian we have *vaed, ved.*[2] In the Germanic we have *wetti, wette, wedde, vadi-um, guadi-um,* and (by sliding the *di* into *ji*) *wage, guage, gage.*[3] In the Latin we have *pignus* in the first two

[1] Goldschmidt, Handelsrecht, I, 20, 29: "In its first stages all circulation of goods is done by barter. . . . In the Germanic tribes, in North Germany even into the 15th century, trade on credit is scanty." Compare the following recital of 1150 A. D.: "Vinum mihi vendidit. . . . Non habens igitur admanum pecuniam, censum quendam . . . in vadimonio ei deposui" (Kohler, 120). Compare the ways in which both Franken (213) and Heusler (II, 131) posit this.

[2] Amira, Nordgermanisches Obligationen-recht, I, §§ 28–31; II, § 22.

[3] Meibom, Deutsches Pfandrecht, 24; Val de Lièvre, Launegild und Wadia, 97 ff.; Diez, Wörterbuch der Romanischen Sprachen, s. v. Gaggio. Our modern word "for-

meanings, and from the same root (πήγνυμι) *pango*, *pag*, *pact-um*, in the third meaning. In the Greek, the verb-stem θετ- (put) has all three meanings.[1] It is not merely that the words for the three ideas were the same; it is much more than that; *there was only one idea* for what we now distinguish as three. That is, the transactions which we now distinguish as pledge, forfeit, and promise, were then not distinguished at all, and only differentiated themselves later and gradually. We may get some slight notion of the unity by noticing how to-day we ourselves say, "I pledge you my word," and "He pledged his watch" (thus using one word for the first and third notions); or, "I stake my honor upon it," and "He held the stakes" (thus using one word for the second and third notions); or how the Germans say "pfand" for the first notion, and "pfandspiel" for a game of forfeits. But of course with us the ideas are still different, though the words may coincide; while with the primitive speaker the one root represented the same general notion. We can, however, describe the past only in terms of our own notions; and, in fixing on the idea which most nearly represents to us the essence of the primitive notion, we find the second one to be the chief and suggestive one, i. e. "bet," or, more closely, "forfeit." The "forfeit" idea is the important one, because, first, out of it the other two seem to have developed, and, next, it brings out most clearly the contrast between the original and the modern idea of the transaction which we now call "pledge." The "promise" idea developed by transferring the moral emphasis from the fact that the transaction was settled to the fact that it was only provisionally settled; the "forfeit" itself was used as a mere form, and was subordinated in idea to that which it came to mark, i. e. the debtor's duty.[2]

feit" (*vorvedja*) preserves closely the *ved* and the *wette* form, as does "bet" (*pace* the Century Dictionary) less clearly; while "wager" follows the *guagium* development. In Scotland, in the 1600's, *wed-setten* was still the generic word for a mortgage; Skene, De Verborum Significatione, s. v. Vadium (1641). Curiously enough, there is a similar coincidence in the verb used, which is usually a synonym of "put"; *saetia* in Gothic and Icelandic, *setzen* in German, *ponere* in Latin, τίθημι in Greek, *ire* in Japanese.

[1] See the references *post*, under Roman and Greek Law.

[2] The connection of the *wadium* with the promise idea is no part of the present subject; but a reminder of the probable features of its development will perhaps make more clear the unity of the primitive root-notion. We may assume (though this has been disputed) that it is the infra-judicial *wadium* promise which was first recognized, and therefore is the process to be explained. This puts before us the case of a defendant against whom judgment is given by the assembly; he finds himself ordered to pay.

On the other side, the "pledge" or "collateral security" idea developed by a similar transfer of emphasis where the *res* handed

How shall he pay? There is no credit; present satisfaction, provisional or final, is all that creditors of that time take. There are three primitive ways of giving satisfaction. One is by handing over property; this is simple enough. Another is by self-surrender, working out the debt if possible. A third is by handing over the body of a relative; this is natural enough from the debtor's point of view, such is the solidarity of family responsibility; from the creditor's point of view it is equally natural, for his ultimate hold on the family property or the corporal servitude of the surety (*geisel*, *pleige*, *fidejussor*) is ample; and it is even a question whether this payment by corporal surety was not the most natural early form. At any rate, it would be so where a judicial sentence of the assembly was to be satisfied; for property enough the debtor has probably not with him, and his own freedom he needs in order to collect what will pay his creditor. He therefore offers one or more of his relatives as provisional satisfaction. A common form (now accepted as authentic) for this was: the debtor hands a stick, a glove, etc., as his *wadium*, to the creditor, bringing forward at the same time the *fidejussor*, and the creditor passes the *wadium* to the *fidejussor*. The problem is to explain this process. A question which all the theories have to answer, viz. how the *wadium* came to be a mere valueless article, is here answered by pointing out that the *fidejussor* was the real payment, — not a surety in our modern sense, but the substantial substitute for present payment, and the real reliance of the creditor. Another question next occurs: Why have the stick-*wadium* at all? Why not merely hand over the *pleige* without the other formality? In fact, we do not find the intervening stick-*wadium* in all primitive laws, — not in the Roman, for example, although we do find the human pledge. But there seem to be two good reasons which account for it in the Germanic law. One is, that, as the typical transaction of provisional payment in every-day life involved the handing over of some *res* on the spot to the creditor, it was entirely natural that this part of the process should persist in form at least. Another is that the handing of the *wadium* to the *pleige* made it possible for him to get redress against the original debtor if he subsequently left the *pleige* to suffer. The debtor could not be thought of as subject to a levy from another unless the other had some mark of a creditor; and the surety would be content with a *wadium* of nominal value (as the creditor would not), because family feeling would compel the debtor to redeem. Thus, the *wadium* was handed to the creditor as a formal, though worthless payment, freeing the debtor; then the *pleige* surrendered himself to the creditor, and thus *liberavit wadium*, taking it himself. In later times, the personal surety dropped out of the transaction, because it was no longer in harmony with social conditions, and because credit had developed, while the *wadium* stick or glove remained associated in form with the idea of plighted faith.

Three facts in particular seem to narrow down the explanation of the process to something like the above: (1) The *wadium* was the regular and proper accompaniment in judgment promises, but was casual only in extra-judicial promises, — indicating the former as the home of the form; (2) the debtor *had* to give a substantial substitute for payment, either property or self or relative; he was primitively never let off with a mere form, — indicating that the *wadium* would never have been allowed to become a *res* of trifling value if it had not been accompanied by other sufficient value; and (3) in the judgment-promise with *wadium* the *pleige* always accompanied it, indicating that it was the presence of the substantial *pleige* which allowed the *wadium* to become of mere nominal value, and paved the way for its becoming a conventional form.

The foregoing attempt to restate the origin of the *wadium* promise is of course based

over remained of substantial value; i. e., the idea that it was provisional led to the disappearance of the "forfeit" idea; the original claim became ultimately the measure of the parties' rights, and therefore the debtor could no longer throw the creditor exclusively on the *res* for satisfaction, nor could the creditor keep it all in case of default. It is this progress from the idea of forfeit to the idea of collateral security which we are to keep in mind as the general feature of our present subject; and we may now proceed to the evidence that this was in fact the course of development of this legal idea.

The varied aspects of the subject and the richness of the material make it necessary to keep within narrow bounds. Legal ideas are so interrelated that many subordinate and troublesome topics must be here disregarded. The usury-prohibition and the history of interest have something to do with our subject, but will not be considered, except as affecting the *vifgage*. Furthermore, the history of judicial execution for debt, which has by many students been supposed to explain the origin of the hypothec, and the source of the institution of rent-charge, which in some periods is almost inseparable from our subject, must be ignored, except where necessary in dealing with the hypothec. Discarding also all other topics connected with the history of real security, it is enough to trace the main idea, and to distinguish the various transactional forms that throw light on it. The topics will be: —

I. The Forfeit-idea, in general, as the forerunner of the Collateral-Security idea. II. The Hypothec (pledgor's possession) as distinguished from the ordinary Pledge (pledgee's possession). III. The Sale for Purchase, as distinguished from the Pledge. IV. The Vifgage as distinguished from the Mortgage.

After noting the development of the idea in the legal systems which furnish the richest materials for examining different stages of the law, the Germanic and the Scandinavian, we may then examine what evidence there is in other systems, — Jewish, Mohammedan, Egyptian, Chaldean, Slavic, Hindu, and Japanese; leaving to the last the Greek and the Roman, as presenting peculiar diffi-

only on the material that has been published by the various workers in that field (Sohm, Brunner, Stobbe, Heusler, Franken, Valde Lièvre, Esmein, Wodon, etc.); but none of the theories hitherto (except Heusler's) seem to have taken into account the original unity of the *wed*-idea, from which the three branches developed, and a restatement from that point of view seems to explain certain facts otherwise unaccounted for. The above statement is substantially Heusler's.

culties, and the French, as involving an acquaintance with the Roman.[1]

GERMANIC AND SCANDINAVIAN LAW.[2]

I. *The Forfeit Idea, in general.*

If the idea above described was that which marked the transaction of primitive times, — the idea of forfeit or provisional satisfaction, — what would be some of the legal consequences in the relations of the two parties? Certain main features would surely be found.

A. 1. If the pledgor chooses not to pay (redeem), the pledgee

[1] Until HEUSLER, the true significance of the Germanic pledge law, in spite of much research and discussion, seems not to have been appreciated. In 1867, von Meibom had established the chief data so as to clear away most previous errors of fact; but he saw in the transaction only an "exchange," and this prevented him from understanding the complete relation of the facts and their historical changes, and it particularly misled him as to the hypothec. In 1882, von Amira clearly worked out the chief data for Swedish Scandinavia. But Heusler (in his Institutionen, 1886) was the first to advance the forfeit-theory for Germanic law, and to state all its bearings, and his analysis (though accompanied by little evidence) is irresistible in its plausibility and its harmony with the evidence elsewhere abundant. The statement in the following pages is substantially an adaptation of Heusler's theory; though the mode of presentation is different, and his theory is not to be held responsible for all the arguments here advanced in its support (especially as to the relation between the *auflassung*-clause and the evasion of the duty to restore the surplus, which does not seem to have attracted his attention). Almost all of the passages quoted in illustration have been culled for the present purpose from earlier publications whose authors knew nothing of the forfeit-theory.

In 1895, von Amira (in his second volume), writing in the light of Heusler's published view, found it amply confirmed and proved it to be the key to the West Scandinavian development. But outside of these two fields, the forfeit-idea as the key to the history of the pledge idea seems never to have been advanced for any system of law, not even for the Roman; and it will be the purpose of a later article to test its validity for other systems.

[2] The references that follow are to these works: 1855, *Stobbe*, Deutsches Vertragsrecht; 1875, Id., Deutsches Privatrecht, II. 1; 1865, *Neumann*, Geschichte des Wuchers in Deutschland; 1867, *v. Meibom*, Deutsches Pfandrecht; 1867, *Sohm*, Prozess der Lex Salica (tr. Thévenin); 1875, Id., Recht der Eheschliessung; 1873, *Schulte*, Lehrb. der Deutsches Reichs- und Rechtsgeschichte; 1874, *Endemann*, Roman.-Kanon. Wirthsch.- u. Rechtslehre [really, Die Wucherlehre]; 1877, *Val de Lièvre*, Launegild und Wadia; 1879, *Franken*, Französisches Pfandrecht im Mittelalter; 1880, *Brunner*, Rechtsgeschichte der Römischen und Germanischen Urkenden; 1892, Id., Deutsche Rechtsgeschichte; 1881, *Weisl*, Deutsches Pfandrecht bis zur Reception; 1882, *Kohler*, Pfandrechtliche Forschungen; 1883, *Esmein*, Études sur les Contrats dans le très-ancien droit français; 1885–86, *Heusler*, Institutionen des Deutschen Privatrechts; 1893, *Wodon*, La Forme et la Garantie dans les contrats francs; 1882–95, *v. Amira*, Nordgermanisches Obligationenrecht: I. Altschwedisches R.; II. Westnordisches R.

cannot compel him; he looks exclusively to the *res* for payment; it *is* a provisional payment. Hence: *a.* the pledgee cannot sue the pledgor, inasmuch as the *res* is his payment; *b.* the pledgee has no redress if the *res* perishes by accident; *c.* the pledgee has no redress if at the maturity of the period the *res* has become less in value than the original claim, or on being sold leaves a deficit.

2. The pledgee, while thus having the detriment arising from the *res* being a payment, has also the advantage; for on default the *res* becomes his *in toto*, i. e., he is not bound to restore the surplus value.

B. Along with these features, but not peculiar to this transaction, is another, whose steps of development have to be noted in order to distinguish them from the preceding features, and to explain later problems, i. e., the feature of defect of absolute title, due to the fact that the transfer of the *res*, being provisional only, lacked the *auflassung* or final abandonment of right by the pledgor. Even after default at the time appointed for redemption, the pledgee's title still has this defect; and while the other features are passing into their later stages, we here find the pledgee successfully endeavoring to remedy this defect; it is this process that has to be carefully distinguished from the others.

To take up the evidence.

A. 1. *a.* No personal action for the pledgee against the pledgor.[1] In the first place, the documents usually do not (as our modern ones do) mention any obligation of debt as arising from or accompanying it;[2] e. g. "we have pledged the manor of Blackacre for 100 marks." Furthermore, the early documents expressly speak of the transaction as a "payment," i. e. extinction of a claim.[3] Finally, some laws particularly mention the pledge's inability to treat the claim as surviving.[4] Strong light is also thrown by the

[1] Meibom, 274 ff.; Heusler, II, 132, 133; Kohler, 99, 100, 137.

[2] Meibom, 276.

[3] "Cum in *solutionem* dictarum 500 marcarum . . . tum in *recompensationem* damnorum . . . castrum . . . pro 1000 marcis *obligavimus*" (Meibom, 278); "pro ipsa causa solidus tantus in pagalia mihi dare debueras, quos et in praesenti per wadio tuo visus es *transolsisse*" (Wodon, 122); "per suum wadium ipsas res . . . reddidit" (Id. 108), and of course the phrases "per wadium meum componere" and "cum uno wadio emendare" were common ones for the process of payment by *wadium*; "ducentas libras Hollandenses ad [dotem] dicte Aleidis promisimus conferendas, et *pro solutione* dicte pecunie eidem obligavimus decimas segetum et minutas decimas" (Kohler, 52; this is as late as 1269).

[4] "When one man sues another for a sum of money and the other answers, 'I deny him not the sum which he claims, but he has a pledge from me [for it],' . . . the former

analogy of the transaction which we now call personal suretyship. The *fidejussor* (as already mentioned) comes to the front in the development of the legal promise through the *wadia*, and the notable thing about his function is that the *wadia* is first given, and then the giving of the *fidejussor* pays and frees the *wadia;* as in the much discussed passage of Liutprand, 37 (Lombard): "si wadiam dederit, et antequam eam per fidejussorem liberit," etc. Furthermore, the whole notion of the *fidejussor* was that he freed the debtor, and stepped into his place just as a *res* would; thus, in the Frankish law, the debtor "liber erit, si fidejussor moritur"; the creditor could not sue the original debtor,[1] and it was only in later times[2] that he had his choice between the debtor and the *fidejussor;* while the question whether he must first seek the debtor before suing the surety is an essentially modern one. Again, the fact that, in later times, when other debts were inherited, the liability of the *fidejussor* was not,[3] (witness the maxim, "le pleige mort, la pleigerie meurt,") is apparently best explained by the notion that his person was simply paid over to the creditor, like a *res*, in liberation.[4]

shall use it [the *res*], and the latter shall remain harmless, and the former shall sell the pledge, as is right" (Bayr. Landr. 240; quoted Meibom, 422). A Lombard commentary on the following formula, "Cujus placiti vadimonia (per usum) debent esse cum fidejussoribus tacita pena," says: "[If the debtor does not come to trial as thus pledged,] non est intelligendum . . . is rem unde agitur debeat amittere; immo . . . intelligendum est quod penam wadie debeat solvere" (Val de Lièvre, 142); and the pains thus taken by the later scribe to assert that the debtor could not get off by letting his pledge be forfeited show that the contrary notion had prevailed and was to be combated.

[1] Esmein, 85; Heusler, II, § 126. Sohm (Eheschliessung, 38, n. 38) offers the forced explanation that "the surety, because he last received the *wadium*, is thus the first in liability"; but it is clear that he admits in effect the fact of the liberatory function, for he had already said (La Procédure de la Lex Salica, ed. Thévenin, App. I. and § 5): "La contrainte procédurale, à laquelle donne lieu le refus, s'exerce principalement contre le fidéjusseur, et non contre le débiteur"; when, moreover, he says, "Le débiteur principal reste lié vis-à-vis du créancier; mais l'action du créancier est dirigée contre le fidéjusseur," the first statement can hardly be correct if the second is, and the law indorses the second. As late as the Schwabenspiegel (258 b, quoted in Stobbe) we find a rule that if a pledged animal dies, the creditor has no claim for the debt, *unless there is a surety;* which shows how the surety was assimilated to a *res* substituted for the claim.

[2] Stobbe, 124–126.

[3] Esmein, 145; Stobbe, Vertr. 132, 195.

[4] Another significant notion of the Middle Ages is the "tavern right"; by which the tavern keeper was obliged to set out drink not only for money offered, but for pledges offered, provided they exceeded the drink value by a certain ratio; the pledge is payment, and the tavern keeper "may re-pledge it for the claim, and shall notify the debtor that he may redeem it, *if he wishes*, at the place where it has been re-pledged" (Kohler, 13).

The progress to the later stage, in which the liability is recognized as independent of the pledge, came through express contract, i. e. if there had been an express promise (*gelobet*) of liability, the *res* became merely collateral to that.[1]

1. *b*. No claim for the pledgee if the *res* perishes by accident. This feature was long a matter of dispute; but the work of Meibom and of Heusler has explained all the difficulties, and settled beyond a doubt the question of fact.[2] The fact is equally clear in Scandinavian law.[3] This rule points clearly to the notion that the *res* is a provisional payment. If the pledgee had been merely compelled to deduct its value from his claim, this result might well have been explainable on some theory of a counter-liability on his part as bailee of the *res*. But the treatment of the *res* and his claim as equivalent shows clearly how the *res* is regarded as measuring the claim as representing it, as having in effect paid it by forming the sole resort of the pledgee for satisfaction.[4]

b'. The next stage is reached by the aid of an express contract;

[1] In the later records, the independent survival of the debt is of course fully recognized, although this does not necessarily indicate that the creditor could look to the pledgor personally. Roughly, there are three stages: (1) to pay off, *per wadium componere*, the pure forfeit-idea, and no notion of debt survival; (2) to pay provisionally, the debt surviving, but the *res* being the creditor's sole resort for payment; (3) to secure in a purely collateral way. See *post*.

[2] Significant passages; Sachsenspiegel, III, 5, § 5: "[If a pledged animal dies without the creditor's fault, the creditor] ne gilt es nicht; he hevet aber verloren sein gelt, *dar it ime vor stund*, [for it stood in its place to him]"; Prague Rechtsb. 166: "Er gilt sein nicht; er hat ober verloren sein gelt"; Ledebach Privil.: [If a pledged house burns down,] si vero domum suam redificare [sc. pledgor] non voluerit, quod remansit de igni cum possessione dat illi cujus vadimonium prius fuerat, et sic se absoluat; creditor postea, quantumcumque debiti superest, *nihil amplius ab eo extorquere*, secundum nostram justitiam, *possit*" (Schulte, 500); Statuta Susatica: " . . . relinquet creditori reliquias incendii vel ruine et fundum pro pignore, sic creditor *nil amplius potest petere*" (Kohler, 114). The passages are collected in Meibom, 283, 426; Kohler, 19, 111–115; Heusler, II, 202; Weisl, 61; Stobbe, Vertr. 263–5. "Ein Haus, ein Brand" was a proverb implying that the risk of fire was on the pledgee: Chaisemartin, Proverbes et Maximes du droit germanique, 223 (1891). For an explanation of the difference between this risk of loss of his claim through provisional payment and the creditor's burden of risk as a bailee, see *post*.

[3] Amira, I, 213; II, § 22.

[4] This notion occasionally finds express mention in the documents: "Verloren se [pledgee] aver edder ere ammechtlude dat slot [castle] van wanheude edder van unlukke, des god nicht en wille, so scholden se ere gheld *in deme slote unde we dat slot* verloren hebben" (Kohler, 114); in another document the pledgor promises to help the pledgee recover the castle if he should be spoiled of it, but if the castle should not be recovered, "so scholet ze [pledgee] dat ghelt verloren hebben, *dar id en vore satet was* van uns, unde vor der scholet ze dar nene nod umme liden" (Kohler, 114).

i. e. the pledgee can claim nothing, *unless* the debtor has otherwise promised (in the common phrases, "ere vorwort ne sy anders," "ire gelovede ne stunde [settle] den anders"). This is the first step towards getting away from the primitive rule; the step being taken, of course, at different times in different communities.[1]

b''. Finally, that which at first needed to be expressly provided for in the contract becomes the general rule without express provision, and the accidental loss of the *res* does not bar the pledgee's action.[2] When we appreciate how natural and established in earlier times the notion was that the creditor could claim nothing though the *res* perished, we see how necessary it was for later lawgivers and custom-records to mention expressly that the claim could be maintained; and we are the more willing to concede that wherever, in a legal literature of scanty sources, we find such an express mention of the modern rule, it indicates that there was a time when the contrary principle prevailed.

1. *c*. No claim for a deficit. If at the time for redemption the *res* is not redeemed, and proves deficient in value, by deterioration or otherwise, the pledgee has no redress; the *res* is his forfeit, and he cannot look beyond it for payment.[3] The significance of this rule for the forfeit idea seems clear.

c'. Here, also, the next stage towards the modern rule is reached through an express promise to pay the deficit; and it is this stage that is best represented in the town laws and customaries of the late Middle Ages.[4]

[1] The just-quoted passage from the Prague Rechtsbuch ends: "jr gelubde stee zwissen in den andere"; so also the Sachsenspiegel passage, "ire gelovede stunde den anders." A clause in a document of 1334 reads: "Wore ouch daz se [creditor] das . . . hus verloren in unseme . . . dinste, so solde wir [debtor] en er phenninge weder geben" (Stobbe, Vertr. 269). The passages are collected in the following places: Weisl, 61; Meibom, 290; Stobbe, Vertr. 269; Heusler, II, 204; Kohler, 115, 315; and for Scandinavia, in Amira, I, 213; II, § 22.

[2] Meibom, 290; Stobbe, Priv. 625, Vertr. 256. In this stage by express agreement the risk is often thrown back on the pledgee; thus: "and if any harm comes to the castle [pledged,] of whatever sort it be, that shall they [pledgee] not demand of us [pledgor] or our successors, . . . nor have any claim or action therefore against us in any way" (document of 1435, Kohler, 332).

[3] Lübeck Stadtrecht: "Brickt eme ock, dat is des schade deme dat erve vorpandet is [But if it falls short for him, that is the loss of him to whom the land is pledged]" (Stobbe, Vertr. 261). The passages are collected in the following places: Meibom, 280; Weisl, 61; Schulte, 500; Stobbe, Priv. 271, 623; Vertr. 260; Neumann, 202; and for Scandinavia, Amira, I, 213; II, § 22.

[4] Example of a special clause (Hesse, 1248): "eo pacto, ut si quid defuerit in predictis, . . . supplere plenarie teneamur" (Meibom, 295); of a judicial decision: "Gebricht

c''. Later still we find the next step taken, and the law expressly authorizes pledgees to collect the deficit from their pledgors.[1]

2. *a*. No return of surplus by the pledgee. If the *res* is really a forfeit, standing for and in place of the claim, the pledgee gets the benefit as well as the detriment, and if, when the pledgor fails to redeem, the *res* is worth more than he would have needed to pay for redeeming, the pledgee cannot be looked to for the surplus; and this is equally true whether the *res* is merely kept by the pledgee or is sold and turned into money.[2] *a'*. The transition comes first through a contract clause requiring restoration of the surplus;[3] and, *a''*, then this settles into the fixed custom.[4] It seems (where careful chronological tracing is possible) to have come first for personal property.[5] Moreover, the notion (2 *a*) that the pledgee need not restore the surplus seems (often or usually) to have suffered the change earlier than the correlative notion (1 *c*) that the pledgor need not pay the deficit;[6] perhaps the explanation of this is, first, that the pledgee usually took care

ihme aber etwas daran, er soll es missen; es were dan dass ihme seine volle bezahlung gelobet und zugesagt worden" (Stobbe, Priv. 624); of a popular customary (Sachsenspiegel, later form): "If the debtor acknowledges that he has promised [gelobet] along with the pledge, the creditor shall be helped out [by payment] over and above the pledge if it falls short; if the debtor affirms that he has not promised along with the pledge [to pay the deficit], the Jew must rest content with his pledge" (Meibom, 282). For collections of passages, see the citations of the preceding note.

[1] See the same citations. The development is neatly seen in the successive revisions (quoted Meibom, 424) of the Hamburg Stadtrecht. The text of 1270 read: "Umbreke eme ok wat, de schade is *syn*"; while the revision of 1292 left it, "Untbreke eme och wat, dhat sca eme *dhe volden des dat goet oder dat erve was*."

[2] This we notice most clearly in the form of the judgment which the creditor (as explained later) obtained. There is no talk of returning the surplus value; it is simply ordered that "he take the pledge to his own use and be from the other man quit and free"; it is his forfeit, and its value is immaterial. The authorities are found in Meibom, 330; Heusler, II, 204; Schulte, 500; Stobbe, Priv. 270, 627; Vertr. 260; Kohler, 137; and for Scandinavia, Amira, I, 203, 213; II, § 22.

[3] Example of a document clause (Hesse, 1248): "eo pacto, ut . . . si quid superest, aut restituat," etc. (Meibom, 295); for other passages, see the citations of the preceding note.

[4] Lübeck Stadtrecht: "Wat dat erve [land] mer gelt, wan dit it vervolget [forfeited] is, dat schal he ime wedder geven" (Stobbe, Vertr. 261); Ditmars Landrecht, 1541 A. D.: "Wunneth he averst mit darumme, also he gelaveth heft; dat overighe gheldt schall he dem rechten sackwolt wedergeven" (Neumann, 202). In the Stadtrecht of Frieberg we see another shade of transition: "Was die pfant bezzer suit, wi si sten, daz mag he behalden; *he mac iz ouch widergeben ob er wil*" (Weisl). For authorities, see those of the preceding note, and Neumann, 204; Weisl, 25, 39.

[5] Amira, I, 203, 213.

[6] Amira, I, 205, 213; II, § 22; Stobbe, Vertr. 260; Meibom, 331.

to obtain a *res* much in excess of his claim, and hence the case of a surplus was forced oftener than the reverse case upon the community's thoughts; and, secondly, the fairness of the pledgee's returning the surplus could be worked out on the theory merely of the pledgor's right to redeem (i. e. if he had paid cash to redeem, he would have got back this surplus value; hence, why not assume a redemption *per rem ipsam*, and give back the surplus, leaving the pledgee no worse?), while the pledgor's duty to make up a deficit could not be appreciated until the independent survival of an obligation, alongside of the pledge, had been fully recognized in thought.

These four features, then, just described, seem to mark as clearly as anything can the theory of the transaction of *ved*, *wette*, *satzung*, as that of a redeemable forfeit or provisional payment. In all four there is a gradual change to the notion of modern times which looks on the debt as continuing in full force, and the *res* as handed over purely as an auxiliary resource for the creditor.[1] We are not to seek in the law of pledge itself for the reasons of the change. The change came about as soon as the community recognized credit widely and developed varieties of obligation and forms of action for them; but this was an independent process. As soon as there were many ways of creating a principal debt, and of enforcing it without a *wette*, then it could be seen that the *wette* need only be collateral and not substitutive. But this would take time to see, and meanwhile the old traditional rules of *wette* would persist by mere inertia. Thus it is that we find some of them

[1] It should be noted here, as to the feature 1 *a* above, that the views of Heusler and von Amira differ. The view of the latter (I. 206) is that after receiving the *ved* the creditor has no claim (*forderungsrecht*) of any kind left against the debtor; and this is also the doctrine of von Meibom (274). The former thus answers it, and states his own view (II, 133): "It is here overlooked that the *pfand* is only a potential [*eventuelles*] equivalent for the debtor's performance, i. e. is given on the condition that payment do not ensue. But this assumes in itself the survival of the creditor's claim. . . . It does not alter the matter that he cannot bring an action for payment; the reason that he cannot is, not that he no longer has a claim, but that he has already in hand his potential means of satisfaction, and thus can of course no longer demand that which already he has provisionally received." Kohler (99, 100) takes the same view. The solution of this difference seems to be that each lays stress on a different stage of development. In the primitive notion of *wette*, there is no more of a surviving debt or obligation than there is to-day in our bet with stakes; but in the course of development the independent survival of the debt becomes more and more emphasized; and one of these stages of transition (and an early one) might undoubtedly be expressed in the language of Heusler, though the view of von Amira more accurately represents the primitive stage.

even in the late Middle Ages long after a fully developed system of debt had arisen; and even in the last century it was necessary in some of the codes in Germany to declare that the loss of the *res* did not deprive the creditor of his claim.[1]

B. *a*. Along with the features of the development just described, there are also constantly mingled certain other phenomena that have to be carefully separated and accounted for. They are the product of the limited nature of the pledgee's property right in the *res* after default, and their transition stages are the result of his effort to make that right absolute. The key to their

[1] The primitive doctrine above explained (1 *b*), that the creditor could not recover even though the *res* had accidentally perished, would probably never have been doubted by scholars as an historical fact if it had not been for the concurrent primitive doctrine that the pledgee was, as bailee, absolutely responsible even for accidental loss. These two doctrines were sometimes, in the legal records, merged into a rule of thumb which has been misinterpreted by some scholars. It can best be explained by taking the troublesome Sachsenspiegel passages. This first says (III, 5, § 4), that the pledgee-bailee is absolutely liable: "Svat man aver deme manne liet [lets] oder sat [pledges], dat sal he [the bailee] unverderft wederbringen, oder gelden na sime werde." Then it makes an exception (§ 5) for animals pledged: "Stirft aver en perd oder ve, binnen sattunge, ane jenes scult [without the pledgee's fault], bewiset he dat und darn he dar sin recht to dun, he ne gilt es nicht." So much as to his liability as bailee to the pledgor offering to redeem. But suppose the pledgor does not redeem, and the pledgee claims the debt (which he would try to do if the *res* were lost); this the law next calls to mind: "He hevet aver verlorn sine gelt, dar it ime vorstunt." Thus, there is an alleviation made for him from his generic liability as bailee to a redeeming pledgor; but the forfeit idea — i. e. as regards his claim against the pledgor — is strictly maintained. The oath of innocence which he takes has to do only with his getting the benefit of the former, and does not affect the latter at all. In the later Magdeburg law the situation is thus described: "der schade ir beide schade sein"; i. e. the *res* is at the risk of the pledgor so far as he is a bailor, and is at the risk of the pledgee so far as he has taken it, in lieu of his claim as a pledge. The distinction in Sweden (Amira, I, 213) and elsewhere by which "both bear the loss" (i. e. the pledgor can hold the pledgee by an offer to redeem) if the *res* has been burned with the pledgee's own goods, though he must replace it if it is stolen, involves a modification of the pledgee's bailee-liability, and does not affect his loss of his claim against the pledgor, which it assumes as unquestioned.

It is thus useless to lay down simply the proposition (as certain earlier scholars did) that in pledges the "risk" primitively was, or was not, the pledgee's; only by taking the above distinction can the situation be accurately described. The two situations may arise separately; for it is only when the perished *res* was worth more than the debt that the pledgor will ever offer to redeem and thus raise the question of the pledgee's liability as bailee; while if the *res* was worth less, the pledgor will not try to redeem and the pledgee will try to make the pledgor pay, and will thus raise the single question of the nature of the pledge-transaction.

Stobbe (Vertr. 260) and Meibom (367) have fully explained, in substantial harmony, the correct significance of the passages; Heusler (II, 203) expresses the same conclusion briefly.

explanation is the part played by the *auflassung* (resignatio, abdicatio, "se exitum dicere") of the Germanic law. It is enough to call to mind that the Germanic notion of a complete transfer of a property-right involved three distinct elements,— the *sale* or *traditio*, the *gewere* or *investitura*, and the *verzicht, uplaten, werpitio, dewerpitio, auflassung, resignatio.* The first two dealt with the transfer of possession or control over the *res*, and were later symbolically merged in a transaction which was in effect single, and is sufficiently indicated by the one word *traditio.* The third, however, remained essentially separate; it signified the final and complete abandonment of all right or interest in the *res.* One would, for example, give *traditio* equally in a sale, a life-estate, a pledge; but in the first there would also be *auflassung*, in the last two there would not.[1] To the Anglo-American lawyer the idea presents no difficulty, for it is already familiar to him throughout the history of his own law; it is in essence and in historical continuity the *remittere* and *quietum clamare* of the 1200's and the "release" and "quitclaim" of later times.[2] The significance and historical importance of the idea can easily be understood by those who have read the articles of Professor Ames on Disseisin.[3]

Now, when the primitive Germanic pledgor defaulted, the pledgee was not hampered by any question of a duty to appraise or sell the *res* and hand back the surplus value; on the contrary, the *res*, so far as it was now his, came to him as a whole and undiminished. But the *res* was not his absolutely; that was his difficulty. It was not that he had a *duty* to sell; such a notion was then unthought of; it was that he had not the *right* to sell. He had only a defective title to give, and even if he disposed of that, the ultimate possessor might (in the case of personalty) hold the *res* successfully against the pledgor by the doctrine of *hand muss hand wahren*,[4] and then the pledgor might come against the pledgee for wrongfully disposing of the goods. The fact that the pledgor was in default by not redeeming at the due time did not help the matter; the trouble was that a defect existed in the very property-right of the pledgee, i. e. he had never had an *auflassung* from the

[1] "*Auflassung*" was sometimes used by older German scholars in a sense inclusive of *traditio.* The true doctrines of Germanic law, in particular the significance of *auflassung*, are here assumed to be those established by Heusler in his "Gewere," and expounded in their latest form in his "Institutionen," II, §§ 92–94.

[2] Pollock and Maitland, Hist. Eng. Law, II, 90.

[3] 3 HARVARD LAW REVIEW.

[4] Heusler, II, 10, 212.

pledgor.[1] This defect prevents him from doing as he pleases with the *res;* usually, he pleases to sell; hence he must get a good right to sell.

Furthermore, the process of curing this defect of title after default must be distinguished from the process of reducing to a term the unlimited period for redemption which the pledgor had if no period had been expressed for redemption. The *wette* without any fixed period was (primitively at least) as common, if not commoner than the other,[2] and in such case the right of redemption might go on through generations.[3] This, too, the tribe of pledgees were interested in changing. But notice that two steps would here be necessary: first, a period must be supplied for redeeming, and then the situation is as if there had been a limit originally; but, next, after a default at maturity of the period, the defect of title also remained, and this, too, had to be remedied, as in the general case above described.

a'. This being so, it is easy to see that the sale of the *res*, about which so much is said in the earlier sources, has nothing whatever in common with our modern compulsory sale. It is simply an incident, and the commonest, in the pledgee's efforts to cure the defect in his title by cutting off the pledgor's outstanding right and thus curing the lack of *auflassung*. Let us examine the unmistakable marks of this.

(1) He is always spoken of as asking for or receiving a "*libertatem vendendi*" or "*distrahendi*"; i. e., he *wants* to sell, and some obstacle to a sale has been removed.[4]

(2) In the stage reached by some of the laws, the permission to realize is confined to a re-pledge by the pledgee for the amount of his claim, and a sale by him is expressly disallowed.[5] Another stage is represented by laws permitting the sale only where a re-

[1] Heusler, II, 141: "If any doubt could exist on this point, it would be removed by the fact that the documents in a *satzung* never speak of *resignare;* that the laws always place *setzen* and *auflassen* in antithesis, using the former for pledge-giving, the latter for ownership-transfers; that the land-registers were classed into *libri resignationum* and *libri impignorationum;* and that after a sale the regular entry is '*coram consulibus resignavit*,' which is wholly lacking for pledges."

[2] Neumann, 192.

[3] Meibom, 380; Amira, II, § 22; hence the proverb, "versatz verjähret nicht."

[4] "Potest venumdare de licentia" is another phrase. See instances in Meibom, 331; Kohler, 7 ff.; Weisl, 25, 39, 63; Amira, I, 213.

[5] E. g.: "[When the pledgee wants to realize on default,] daz [the *res*] sol er dem andern ansagen [notify], und wann der daz nit zu lössen hat, so soller daz nit höcher versetzen als um sein schult, *aber verkaufen soll ers nit*" (Kohler, 11).

pledge is not practicable.[1] Still others give an option either to re-pledge or to sell.[2]

(3) The proceeding which he took was the generic one for cutting off outstanding claims. The pledgee or other person applies to the judge to summon all who may have any claim to the *res* to come and make it known; then the judge appoints a period for this, and at its end, by the expedient of *mittere in bannum*, declares the petitioner's title absolute.[3] The notice in this case was: "This pledge is to belong to this man, according to his right; if there be any one who would redeem it, let him take care to redeem it, as his right is"; and the judgment was, that "he take the pledge to his own use, and be from the other quit and free"; and the phrase for it was "eigenen," i. e. it was made his own.[4] In the case of personal property, where the periods of *aufbietung* were short, — three weeks, for instance, in some customs, — and where the pledgee was usually in later times a professional money-lender, the process reduced itself in effect to a sale after notice, and the statement of the custom would briefly be that the pledgee was per-

[1] E. g.: "Wel her [pledgor] is denne nicht loszen, so vorseczte her [pledgee] is vor sin gelt, ob her mac; *kan her is nicht vorsecze*, so mag her is vorkouffe" (Kohler, 6).

[2] Kohler, 7, 14. The reason for the pledgee's readiness to re-pledge seems to have been, as Kohler suggests (19), that as the risk of loss (both as bailee and as creditor) was upon him, he would naturally be anxious to get rid of the risk in any way.

[3] Heusler (II, 85) describes the process; examples of terms of delay, etc., are given in Kohler, 10 ff. This *ufbiten*, *aufbietung*, or offering to the debtor for redemption, is not to be confused with the same process when made to cut off the claims of the heirs (or other persons having the *retraktrecht*, *retrait lignager*, or right of preferment in buying). In the periods and places where this survived, the cutting-off process might also have to be employed as against such persons; yet by some customs the debtor was bound to have offered the *res* in pledge first of all to those persons, and thus there was no need for cutting off the right which they had previously renounced. The different varieties of situations are illustrated in Amira, I, 221; Kohler, 116; Weisl, 42.

[4] That it was this generic process to which the pledgee resorted is clear: Meibom, 335; Heusler, II, 138; Stobbe, Priv. 270, 623, 627; Amira, I, 213. Its nature is well brought out in the case of the indefinite-period pledge; for here the pledgee had to have two periods fixed. By one he merely got a time fixed for redemption, i. e. made it possible for a default to occur; by the other he cured his defective title after default made; thus, from the Prague Stadtrecht: "Si judaeus receperit a christiano pingnus, et per spacium *unius anni* tenuerit, si pingnoris valor mutuampecuniam non excesserit, judaeus pingnus judici suo demonstrabit ut postea habet libertetem vendendi; si quod pingnus apud judaeum *diem et annum* [i. e. additionally] remanserit, nulli postea desuper respondebit" (Meibom, 333); "[The pledgee] so sol iz zu pfande haben jar und tag, [then a triple summons and offer, then] is der richter vor etlichen scheppfen disem [pledgee] ledicleychen antwurten [pronounce free], das er is vorsetzen und vorkauffen muge und seines geldes doran bekomen" (Kohler, 8). For Scandinavia, see Amira, I, 203.

mitted to sell after notice. But this was merely the superficial feature; the process was in essence a making the title absolute, and the sale was simply the use which would generally be made of the *res* when the title became absolute.

(4) That the cut-off proceedings had in essence nothing to do with sale, and in particular that the sale had nothing to do with any duty to restore the surplus to the pledgor (our modern idea, which is apt to be associated with this older process), is further clearly seen from the facts that (*a*) the pledgee was allowed to employ the cut-off process, and to get permission to sell or to keep, long before he was compelled to restore the surplus,[1] and (*b*), conversely, the duty of restoring the surplus, when that stage is reached, is found even where the pledgee keeps the *res*, and quite independent of sale by him.[2]

a''. This proceeding, then, by means of *aufbietung* and *mittere in bannum*, supplied the defect of title which arose from the lack of the *auflassung*, *resignatio*, or "release" element. But why could not this be supplied by the pledgor himself? It could be. It might be done by actual *auflassung* or *resignatio* after default;[3] but this was rare, of course, being dependent on the pledgor's good will. Instead of this the customary method came to be the embodiment of an *auflassung* clause in the original document, —

[1] E. g. in Lübeck, as late as 1325, he might sell without accounting for the surplus: Meibom, 332; see also Amira, I, 203. A custom of Noyon, in 1181, shows clearly the process: "Siquis terram vel domum in vadimonio posuerit, vel aliquid aliud, et determinato tempore non reddiderit [paid], ille qui vadimonium habet, si voluerit illud assignare sivi et ad se trahere, judices et scabinos illuc adducat, et si post infra quindecim dies redemptum non fuerit, perpetuo sibi jure possident" (Kohler, 138).

[2] E.g. in Freiber, it was provided by law "doch das dieses pfand geschätzt sey durch das gerichte, und die besserung an dem das guth gewest [i. e. pledgor] geweiset werde" (Meibom, 338). So for an express clause in a document of 1077 in Salerno: "Et si ipsi tari [golden money] minime nobis [pledgee] retdere potuerit de propria sua causa, et illut nobis dandum venerit, atjungamus [hand over] ei pretium a super [over and above] ipsi tari, sicut ipsa rebus abpretiata fuerit per doctos omines et deum timentes, et firma nobis carta emtionis secundum legem facta et cum pena obligata" (Kohler, 88); on default the pledgee is to restore the surplus "quanto tres justi hominis existimaverit," and the pledgor is to execute a deed of sale (Id. 86). See also Amira, I, 205. In many laws the pledgee is expressly said to have his choice between keeping the *res* and selling it: Weisl, 69; Stobbe, Priv. 623. 627; Amira, I, 205; II, § 22.

[3] Heusler gives an example (II, 139): "Predium meum abbati pro C marcis exposui et statuto die cum memorata pecunia solvere proposui; cum vero prefixus dies advenisset et abbas argentum mihi dudum datum requisisset, minime illud recompensare valens, predium abbati in perpetuam possessionis institutam obtuli."

this being done at a time when the debtor would be more ready to concede any terms demanded. Until the use of the *carta*, or written conveyance, became customary, and the process of transfer at a distance from the premises and by *carta* alone became frequent, this embodiment of the *auflassung* in the deed of pledge would not be so natural; but towards the end of the Middle Ages it would be the most natural method (except for personal property, in which transfer by document would of course be unusual, and, originally, impossible[1]); and hence, while the judicial cut-off proceedings always remained the usual resort of the pledgee of personal property, the pledgee of real property, by the above period, more frequently attained his purpose by a *resignatio* clause in his pledge document.[2]

a'''. Abuse of the *resignatio*-clause. So far all was well; the thought of the community was that the pledgee should have his cut-off, and he was allowed to get it either by the judicial proceeding or by the deed clause. If the primitive rule as to non-restora-

[1] Heusler, II, 201.

[2] The forms are innumerable: "[On default, the pledgee] in posterum tria jugera titulo emtionis pleno jure proprietario, cum pleno rerum domino, quod exnunc sicut extunc in eum transferimus, libere possidebit" (Heusler, II, 140); "Si intra hinc et festum . . . non exsolvimus, . . . ipse dominus [pledgee] dicta pignora pro se retinendi, ea obligandi, et vendendi, plenam facultatem habebit" (Meibom, 333); "[the pledgee] poterit vendere absque ulla prosecutione coram judicio facienda [i. e. without cut-off proceedings]" (Id. 335); A has pledged for seven years; if he can, he may redeem them; if he cannot then pay back the money, the land "pertinebit in perpetuum" to B (Wodon, 162); "Wadiavit . . . salinam . . . usque ad 21 annum; [if unpaid] . . . maneat in monachia sempiterna" (Id. 164); "si infra ipsi jamdicti decem annis completis nos vobis non potuerimus retdere ipsi jamdicti solidi, . . . vos abeatis integra eadem rebus [described] . . . , ad vestram proprietatem abendum et possidendum et faciendum exinde omnia quod vobis placuerit" (Kohler, 87); "[if default occurs,] permaneat ipsam terram supradictam ad R. [pledgee] et cui voluerit post se, in alode et comparato" (Id. 90); "si tunc redempte non fuissent, permansissent usque ad finem mundi" (Id. 91). Just as the judicial permission allowed a re-pledge, as preferable to or optional with a sale (see *supra*), so the pledgor's permission in the document might do the same: "Daruber gib ich in daz urlaub, ob in sein not geschicht, daz si di vorgenanten heof mit meinem guten willen, swo ich sei sezzen, wenn si mugen oder wellen" (Kohler, 16); and the permission might also cover a sale, instead of a self-appropriation (Kohler, 16, 17). — The difference between the ordinary pledge-clause fixing the time of redemption and the clause of *resignatio* renouncing all right in advance and giving absolute title contingent on default is clearly to be seen in these two examples; the first, fixing a pledge period: "per nos tenendam et habendam tam diu donec . . . pro predicta summa . . . redimatur" (Meibom, 279; see also Heusler, II, 138; Kohler, 287, 292, 307); the next, renouncing in advance all interest: "si nos in solucione negligentes extiterimus, . . . antedictum mansum et curia transibunt in possessionem et dominium *sine contradictione qualibet*, suis usibus perpetuo servitura" (Meibom, 261).

tion of surplus had continued, and, even then, if the judicial process had remained the sole or usual cut-off method, no new problem would have arisen. But the old rule had been left behind, and the pledgee was by this time bound to restore on default the surplus value to the debtor (whether he kept or sold the *res*). So long as he resorted to the judge for achieving his cut-off, the duty of restoration was managed easily enough; the judge declared the title of the pledgee absolute, either for keeping or for selling, on the terms, in the former case, that the *res* was appraised and the excess value paid to the debtor, and, in the latter case, that the surplus money received was so paid over. But when the cut-off came to be attainable (for landed property) by a *resignatio*-clause in advance, the pledgees soon found that this was an excellent method of evading the new rule about surplus restoration; for the *res* on default became the absolute property of the pledgee without his going to court, and he could keep it all, which he could not do if he had had to apply to the court; hence the popularity of the clause. It will be seen that, in the examples cited in the preceding note, the clauses all provide that the *res* shall go *in toto* to the pledgee, without any provision for surplus restoration. Now until the old notion of forfeit or equivalency had been thoroughly cast aside, and until the rule about surplus restoration had become a solid and instinctive element in the legal thinking of the community (which in some places did not come till the 1400's), the community would not be prepared to protest against this ingenious evasion of the rule by the use of the *resignatio*-clause. But when that time did come, the evasion would have to be stopped. It was not that there was anything to be said against the *resignatio*-clause in itself, i. e. as a cut-off; for this very cut-off was that to which the courts themselves had been accustomed for several centuries to aid pledgees. It was the abuse of this particular cut-off process in evading the surplus-restoration, that made it vicious. Now the enabling circumstance for the pledgee was that he got absolute title by operation of the deed, without going into court; and thus the obvious thing, by way of remedy, was to oblige him to do just what he had been used voluntarily to do under the old *mittere in bannum* proceeding, viz. come into court to get a complete title; for then the court itself could see that he accounted for the surplus. Thus the difference between his coming into court in the 900's and his coming into court in the 1500's was radical; then, he came *voluntarily* to get justice and have a defect of title cured;

now, after he had found out another way of curing that defect, and was using it to abuse a principle of justice that had grown up in the meantime, he came into court *compulsorily* to be made to do justice; the two situations being wholly distinct.[1]

This, then, is the stage at which the pledge transaction emerges into what we call modern history. All through the 1500's the German customary laws were forbidding this evasion.[2] Already before this time the sea-laws of Wisby, with their advanced commercial ideas, had taken the same step.[3] The same period finds the English courts occupied with the same undertaking. The imperial prohibition of the *lex commissoria* in Roman law, which has served as the theme of much fruitless discussion, is nothing more nor less than the same feature in the development of another legal system. The indigenous working out of the process in Germany was probably stopped by the reception of Roman law, which had long ago settled upon its solution of the problem.[4] The details of its working out in England cannot be examined here.

For the form in which the problem was presented to modern law, then, we were indebted to two distinct principles, operating together to cause confusion and misinterpretation in the modern student's mind. First (A) the forfeit notion which had primitively prevailed, and had then given way to the notion of collateral security; and, next (B), the necessity of a *resignatio* or *auflassung*, which left a defect in the pledgee's title, and led him to strive to cure it, and revealed to him, in curing it, a way of evading the other principle; so that it became necessary for the law, in maintaining the former principle, to deal with that form of the latter through which the abuse was perpetrated. Only by keeping clear the history and separate workings of these two principles can we

[1] So that such a provision for sale or forfeiture as the following, which would fairly represent in its terms one of the earlier mediæval town laws, exists on modern statute books for wholly different reasons; Code Civil, art. 2078: "Le creancier ne peut, à defaut de paiement, disposer du gage; sauf à lui à faire ordonner en justice que ce gage lui demeurera en parément et jusqu'à due concurrence d'après une estimation faite par experts, ou qu'il sera vendu aux euchères."

[2] See examples in Stobbe, Priv. 270, 627.

[3] Amira, I. 213.

[4] The Roman law brought with it into Germany the prohibition of the *lex commissoria* or forfeiture-clause, and the prohibition still prevails, upon the theory that it enables the creditor unjustly "to obtain extraordinary profits" (Motive zum bürgerl. Gesetzb., 1888, III, 680, 820). As late as 1881 the courts were called upon to say that the Imperial law of 1867, abolishing the usury prohibition, did not abolish the *lex commissoria* prohibition (Vierhaus, Sammlung kleinerer privatr. Reichsgesetze, 303, n. 4).

understand the form which, by their collision, they gave to the transaction and the problem as it came before modern Germanic courts.

II. *The Pledge without Creditor's Possession.*

Neither etymology nor usage furnishes us in our language with terms exactly expressing the antithesis between the giving and the not giving of possession of the *res* to the pledgee; for the purposes of discussion, however, it is necessary to have a term that implies merely this antithesis; and accordingly the word "hypothec" will be here employed as indicating a pledge of which the custody is not given to the pledgee, but is retained by the pledgor.

The problem, of course, is to ascertain why that form of the transaction was in a given case chosen instead of the other, — to account for its existence as a distinct legal expedient. Not until we have learned this shall we be able to interpret and to harmonize its peculiarities, whatever they may be, and to understand its development. Now the dominant theory, particularly since Albrecht and von Meibom, has been, that in Germanic law the hypothec was a later ("neue Satzung") and an independent development; that when the primitive remedial expedient of self-redress (as a source of creditor's satisfaction) had developed into a system of regulated judicial execution for debt, the creditor found it natural to avoid the necessity of appealing to legal proceedings by securing beforehand from the debtor a consent to such a levy in case of default, the object of the transaction being the gaining of a right on his part to cause a sale of the property on default, and to take the proceeds sufficient to satisfy his debt. The theory of Brunner[1] and of Franken[2] (though only briefly explained) is slightly different, in that it posits a more direct historical connection between the process of judicial execution and the institution of hypothec; but the essential notion of the expedient in both theories is the same. The marked feature assigned to the hypothec (though they do not clearly bring out the antithesis between the "new" and the "old" *satzung*) is that it is a specific lien created by the debtor for the ultimate purpose of obtaining proceeds for the creditor by a sale (in Franken's phrase, "nach dem Verkauf zielend"). This notion

[1] 1880: Rechtsg. der Röm. und Germ. Urkunde, 194: "eine aus der *missio in bannum* hervorgegangene amstrechtliche Verpfandungsform jüngeren Aufsprungs."

[2] 1879: Französisches Pfandrecht, 7: "Der Gerichtsbann ist die Wurzel der Immobilar-Execution, und damit auch der neuern Satzung."

is natural enough to the Continental scholar; for in the law that he lives among he finds the *hypothek* (*hypothèque*) — the modern representative of the *neue satzung* — scarcely to be distinguished from our "lien," or sometimes even from a preferred claim in bankruptcy; the number of *privilèges* and *hypothèques* given by law on the entire estate, and the frequent practical identity in legal effect between those and the consensual hypothec, tend to obliterate the distinction in thought; and the historical assimilation of the two would thus *a priori* commend itself there as plausible. But to the Anglo-American lawyer the learning about mortgages and the learning about liens and execution and preferred claims are distinctly separated in history and in thought; and he makes a natural association, wanting on the Continent, between mortgages with and mortgages without creditor's possession. This natural relation which is found in the legal thought of the modern community that peculiarly represents in its law the continuity of Germanic tradition will to us suggest *a priori* the plausibility of a wholly different view of the hypothec's history, which has been championed by Heusler and von Amira, — the view that it is historically of a piece with the generic *wed* (or *satzung*) already described; that it was simply a variety of that transaction, adapted to a special purpose; that it bore the features and followed in the main the development of the *wed;* and that it had no connection with the peculiar expedient of judicial execution until fairly modern times. This view we may now consider; first setting out the evidential marks of identity between the hypothec and the generic *wed* or *satzung* already explained; next, examining the *raison d'être* of the former; and then noticing its ultimate fate.

1. The hypothec, or "neue satzung," as identical in purpose and features with the generic *wed, satzung, ved.*

a. In the first place, the name is identical; this alone starts the probabilities in favor of an identity of institution.[1] They are en-

[1] *Satzen, versetzen* (verb idea), and *ved, wed, weddeschaft* (the *res* idea), were the generic terms for both: Meibom, 36; Stobbe, Priv. 273; Amira I, 193, 216; II, §§ 22, 23. *Unterpfand* (perhaps a translation of *subpignus*) and *subpignus* (the Roman term) came to designate the hypothec form: Meibom, 36, 263; Neumann, 197; Heusler, II, 148. (*Subpignus* in modern German writers is often used to mean a pledge upon a pledge, or *afterpfand*, i. e. by a pledgee himself; but it did not mean this either in Roman or in Germanic law: Sohm, Lehre der Subpignus, I). *Faustpfand, handhabendes pfand*, denoting the pledgee's possession of personalty, were later phrases based on the false etymology (*pugnus*, fist) of the Roman *pignus:* Meibom, 37. *Vorkummern* or *bekummern* (our English "encumber") came to be, so far as anything was, the term for

hanced, moreover, when we find that the phrases in the other line of doctrines about private redress — pledge-taking, etc. — and about the later judicial execution are constantly contrasted with the terms indicating a voluntary pledge.[1]

hypothec; and the terms *versetzen* and *vorkummern* are in later times often grouped as covering all kinds (see examples in Meibom, 429), much as *pignus vel hypotheca* were in Roman law, the former being the generic term, and the latter a species. *Kistenpfand* in some regions was used to denote the hypothec; "posuit domum suam pro cistoli pignare," "sette sin hus to eyme kistenpande": Meibom, 423; Amira, I, 216. *Für-pfand*, or contingent pfand, was another name used in Bavaria: Heusler, II, 148, Kohler, 234.

[1] The contrast of ideas appears in the two words *nam* and *set*, *nehmen* and *setzen* ("seize" and "hand over"): Meibom, 24; Amira, I, §§ 15–21. Other words in some places used instead of *nam* have the same idea: *badian* (force), *raf* (*raub*, seize): Brunner, II, § 110. This antithesis in the verb idea of the transactions lasts till modern times. The development of one is a part of the history of procedure; of the other, a part of the history of substantive law; and all the associations of the hypothec transaction are with the latter, not with the former.

But there is one confusing circumstance; *pfand*, *pant*, is used for both transactions; and this must be accounted for. Now the sources of the later law of execution were, roughly speaking, two (Heusler, II, § 117; Brunner, II, §§ 110–112; Amira, I, §§ 15–21, 28; II, §§ 11–16). (1) The creditor or injured person could primitively, in limited cases and following certain rules, go himself and carry off (*nam*) movable goods of the debtor sufficient to pay; they then became to him a forfeit-payment of the ordinary sort, i. e. they were at his risk till redeemed, and if not redeemed they were forfeited to him absolutely without regard to any surplus value; in Scandinavia the thing thus taken was designated (from the verb idea) as *nam*, while in Germanic tribes the thing taken was called usually *pant* (a word of uncertain origin, but probably having the same force). (2) Where the debtor's outlawry had occurred, the injured person might by a *strudes legitima* or "legal rape," go and get satisfaction from the outlaw's confiscated personalty; and, much later, the doctrine of *missio in bannum regis* obtained for him a similar satisfaction out of the confiscated realty, — the phrases being *missio in vorbannum*, *fronbote*, *fronung*, and the like. Now these two processes worked towards each other, so that they came to share the common feature of securing satisfaction from any defaulting debtor subject to the control of the court. But the distinctive feature of the former process was still that the creditor got the *res* as a redeemable pledge only; while in the latter he got a true payment on execution. Hence the former process had bonds of relation with both the ordinary *wed* transaction and with the execution or *vorbannung* process; and for the one relation the *pant* word came to serve, while for the other the *nam* or *nehmen* idea was emphasized. Moreover, since what the creditor almost always got by *nam* was personalty, personalty pledges came naturally to be called *pant* generically, and the *wed* term was thus largely driven out of usage for personalty (though *wadium* originally covered both personalty and realty, and though the process itself — the *nam* — from which *pant* was borrowed, had a history independent of the *wed*); moreover, the original state of things is further shown by the fact that in Scandinavia *ved* was not thus driven out, though *pant* when borrowed from the German in later times covered, as in Germany, pledges both *nam* and *set*. Later still, *pfand* partly extends to realty also, — in such compound words as *kistenpfand*, *pfandschaft*. The case is much like that of our "pledge"; originally *pleige*, a personal surety, it practically drove out *gage* for personal property and restricted it (as "mortgage") to realty; yet the old law

b. The pledge without creditor's possession is found quite as early as the other form;[1] which indicates that it cannot have made its first appearance through the development of the *missio in bannum.*

c. The documents indicate its nature to be simply that of a postponed or contingent *wed.*[2] This characteristic is the key to its origin, and will be explained later; it is enough here to note that the primitive transaction does not show signs of being complicated by the phrases of judicial process; it merely creates a present *wed* for the creditor, as payment against a loss which he *may* suffer, the debtor keeping possession until the issue is ascertained; and if it turns out that the pledgee does suffer the loss, he takes the *res* like any other *wed.*[3]

In some laws a transfer to take effect in future was not valid unless the transferee first had a present *gewere* vested in him for a year and a day; but just as actual transfer of *gewere* could here be avoided in such ordinary sales or gifts (i. e. with reservation of a

of personal suretyship is no more to be looked to as the source of our "pledge" doctrines than is the process of *nam* for the Germanic doctrines of *wed* and *pfand.* It should be added that as most hypothecs were of realty, and as *pfand* was chiefly applied to personalty, the hypothec is almost always (except in *kistenpfand*) dealt with in mediæval Germanic law in the terms *wed, satz, satzung;* and thus there is ample evidence from etymology that the hypothec is quite distinct historically from the process of execution, independently of whether we are able or not to account for the use of *pfand.* Nevertheless, that use, though confusing, seems quite capable of explanation in the above manner.

[1] Stobbe, Priv. 272; Heusler, II, § 104; Amira, I. 216. Kohler, 24, gives a *capitula* as early as 866, dealing with it.

[2] A Scandinavian example (Amira, II, § 23): After selling a piece of land with warranty: "That this sale may be more firm and trustworthy, J. [the seller] has put us [the buyer] his farm of five acres, in M., in full liability, so that we are to take it if the above piece of land should be sued away from us." Germanic examples: After selling a mill and engaging to get the lord's consent to the sale: "quod si negligentia vel culpa prepediti non fecerimus, curias duas in M. ecclesiae loco molendini contulimus perpetuo possidenda" (Heusler, II, 145, also 152); after stating a debt: "Predictam autem villam tibi obligo et in pignore pono, ut si minime fecero te ad deliberandum ad suprascriptum terminum eo hordine et racione ut supra legitur, tunc tribuat tibi potestas *accedere et intromittere* sive ad proprium dominare *ipsa vestra pignora,* et tamquam legitimum documentum possidere, nullo vobis homine contradicente" (Kohler, 353); "Nos . . . *subpignoramus* curiam nostram . . ., et si in solucione . . . negligentes extitimus, . . . immediate, cum ipsis [creditors] placuerit, . . . *accipiant* subpignora nostra" (Meibom, 227, 261).

[3] As Heusler expresses it (II, 145): "*Satzung* with a vesting of *gewere* in the creditor and *satzung* without transfer of *gewere* bear the same relation to each other as *traditiones a die praesente* and *traditiones post obitum.* Just as the latter are in nature and purport legally similar transactions, so the two types of *satzung* reveal themselves as one and the same."

life estate) by the transferor's paying a rent, nominal or substantial, in recognition of the transferee's *gewere*, so the same expedient was resorted to in hypothecs;[1] and so far as in later law the same end could be obtained in other cases by simply handing over a sealed deed drawn before a court officer, or by making an entry on the court records, it was also done for hypothecs.[2]

d. The unmistakable marks of the forfeit idea, which we have seen to belong to the ordinary *wed*, are found also in this form. In the first place, the *res*, if default occurs, in primitive times, pays the pledgee regardless of its deficiency of value, and the pledgor cannot be looked to for the deficit;[3] while (as we saw above) the later law finds this departed from, and the debtor made liable for the deficit.[4] In the next place, the *res* was forfeited, in the sense that the creditor took the whole, without any duty to return the surplus,[5] — as in the ordinary *wed* or *satzung;* but here, too, the later law gets gradually away from this, and we find a valuation and return of the surplus.[6] As before, in the ordinary *wed*, the

[1] Heusler, II, 147; the pledgee of a *res* intended as contingent payment for a breach of warranty is given "gewerschafft zu rechtem fürpfand," but until default he is merely to "ab dem fürpfand jährlich zu nutz und gewer rechter pfandschafft nemen ein hun."

[2] Heusler, II, 147; Bav. Landr.: "Wer dem andern pfant untwurt, und daz pfant dannoch in seiner gewalt beleibt, . . . da sol er im brief über geben mit sigel": Meibom, 49. Hence the custom of merely handing over title deeds to the pledgee as a form of hyopthec: Heusler, II, 146; which lasted in Regensburg till 1813: Stobbe, Priv. 274; and is found in other countries as well. Moreover, so far as an ordinary transfer of land was required to involve a formal transaction before the assembly or court (Heusler, II, 100), just so far would this contingent pledge transfer require the same, and hence historically the origin in some regions of registration as necessary to the validity of hypothecs: Weisl, 42, 50; Stobbe, 287; so far as this persisted later and was extended, in the absence of a general transfer-registration, reasons of policy could have induced this special survival.

[3] Stobbe, Priv. 276–278; Amira, I, 216; II, 23. Moreover, the same general but indescribable evidences of the equivalency-idea run through the documents, which give the reader a clear impression of the identity of the *wed* idea in both.

[4] Stobbe, Ib.; Amira, Ib. (in the first passage, the Wisby law represents the more advanced or later stage).

[5] Stobbe, Ib.; Amira, Ib.; Meibom, 435.

[6] Stobbe, Meibom, Amira, *ubi supra.* A clause from a document in Meibom, 261, 262, shows how the *auflassung* or *commissoria* clause was used to dispense with the duty of restoration which the later law ordinarily placed on the pledgee; upon default, the pledgees "cum placuerit, immediate accipient subpignora nostra, facientes cum hiis omnibus, secundum formam proprietatis tituli, quitquit ipsis videbitur expedire"; again, "Si non redederemus . . . licentia aveatis tu aut tuos heredes supradicta terra avire et dominare in vestra potestate" (Kohler, 85). In Norway, the different stages appear very distinctly; the pledgee takes the whole *res* in forfeit, *unless* there is a special agreement that he is to take the equivalent of his claim only; in the next stage, he is

latter development — the pledgee's duty to restore the surplus — comes before the former, — the pledgor's liability for the deficit.[1] Parallel with this development of the forfeit-idea went also, of course, the development of the pledgee's efforts to cure the defect of his title, as already described for the ordinary *wed* with pledgee's possession; the pledgee on default was allowed to take proceedings to cut off the pledgor's right,[2] and he could also attain the same end by inserting in advance an *auflassung* or *resignatio* clause (*lex commissoria*);[3] and this, too, the law afterwards struck at (as already explained) by compelling (not merely permitting) him to sell or re-pledge, in order that he should not by forfeiture of the *res* evade his duty of restoring the surplus value.[4] The presence of these marked features of the forfeit-idea and its development seems to dispose conclusively of the "anweisung von executionsgegenständen" theory, — the theory that the original notion of the hypothec form was the securing of a lien on a *res* to be sold to get proceeds; as well as of the other theory, that originally by the *missio in bannum regis* the property was sold and the debt paid out of the proceeds.

e. The pledgee obtained a title to the *res*, good against third persons. This, if true, militates strongly against the theory that the

to take the exact equivalent of his claim, unless by special agreement he may take the whole. In Iceland an intermediate stage appears, in which he is to take double the amount of his claim, by measuring off for himself the land required, according to a valuation of the neighbors, — unless other creditors would suffer owing to the debtor's insolvency, in which case he takes only the exact equivalent; in the later law, he takes always the exact amount only.

[1] Stobbe, Amira, *ubi supra*. This is neatly to be seen in the laws mentioned by Stobbe; in some of them the stage of handing over the surplus is not yet reached; but in most of them a sale is to be made and the surplus handed over; within this latter group, however, are still some which do not require the pledgor to make up a deficit. So in Amira's records, the Wisby law, representing the later stages, requires the pledgee to restore the surplus, and the pledgor to make good any deficit; but an earlier text of the Hamburg law, on which the Wisby law was founded, does not contain a clause making the latter requirement.

[2] Stobbe, Priv. 276; the pledgee usually summoned the pledgor three times, and then the court gave him the ownership.

[3] Some examples have already been given in the last note but one. It is worth noticing that a common form was one which (as we shall see) had formerly been used and much discussed in Roman law; the pledgor describes the transaction as a pledge, and declares that on default the *res* shall belong to the creditor as by sale, and gives the requisite *auflassung* in advance: "A *resignavit* R. hereditatem . . . pro 50 marcis . . . *tytulo pignoris*, usque ad instauc festum nativitatis Domini; si tunc argentum sibi non solverit, tunc dictam hereditatem *justo emtionis tytulo obtinebit*" (Meibom, 435; 1327 A. D.).

[4] For Scandinavia, see Amira, I, 216.

debtor has merely promised the creditor a general right of levy and sale on default which he would otherwise either not have at all or have only by legal proceedings. This, if true, is more in harmony with the notion that the specific *res* is now the creditor's, subject to the contingency of default. That the pledgee did obtain a right good against third persons (e. g. to whom the pledgor might wrongfully transfer the *res* in the interim) seems clear, though it has been much disputed.[1] Moreover, a hypothec

[1] Heusler, II, 149; Amira, I, 216; II, § 23 (Iceland), 27 (Norway); Meibom, 428; Kohler, 22; Schulte, 500. Commonly this was specifically provided for by a clause; thus, for a ship: "Posuit navem suam pro 26 marcis, ita quod nec ipsam vendere poterit nec exponere [second pledge], nisi prius dicti denarii sunt per soluti" (Meibom, 412); so in the Codex Cavensis: "Non habeamus potestatem per nulli modi nec bindere nec donare neque per nulla rationem ubique ipso dare" (Kohler, 23, 85). It has been suggested by Stobbe (Priv. 275) that this clause was intended to remove a doubt as to the existence of a property-right in the pledgee, and thus protect his interest; but this seems unsound, not only because the laws show explicit recognition of the right (see *infra*), but because (as Heusler points out, II, 149) this would not be an effective way of removing the doubt. Heusler's reason, however, (that the pledgor, having the *gewere*, could effectively employ it improperly were it not for this clause), does not seem more satisfactory; a better reason seems to be the simple one that, since the pledgor could effectively transfer the *gewere*, and since the pledgee (having agreed to treat the *res* as the equivalent of his claim on default) would ordinarily have no further claim for payment against the pledgor, and hence no redress at all in case of alienation followed by the buyer's year-and-day *gewere*, he naturally tried to protect himself by a special agreement from the pledgor not to transfer it; which would thus give the pledgee a claim for indemnity against the pledgor if he did. The pledgor's alienation was also often expressly prohibited by law (a law of 1658, quoted Kohler, 23: "Es soll niemand güthere verkaufen noch verwenden die der stadt oder jemand anders zum pfande stehen, er thäte es dann mit des raths erläubnuss oder mit willen sein bürgen und desjenigen den si unterpfändlich hafften, bey der busse eines neuen schockes"); the purpose being here, not to save the pledgee from losing (for he would not), but to save purchasers from being defrauded; so also in Sweden (Amira, II, § 23).

That the law, quite apart from contract clauses, recognized the pledgee's right as pledgee to pursue the property though alienated is seen by the numerous provisions declaring that this pledgee's right should last no longer than a year and a day; this was because the purchaser's *gewere* after that time would protect him, — as indeed it would against any ordinary claimant (Heusler, II, 103, 149), whence the entirely normal nature of the creditor-pledgee's property appears still further; thus: "Verkaufet eyn man synen huf, und vorreycht [transfers] den vor gerichte, den hof mogen des mannes schuldigere [creditors] nicht bekummern [obtain by hypothec], is sen sy [unless] dass der man, ee her den hof vorreychte, gelobit [promised] hette vor gerichte dy schult zu bezulen und hette sich verpflichet und gelobit by syme sygen [seal]; wo daz geschege, so mochten die schuldigere den hof wol bekummem, und die ufreychunge [transfer] by [within] jare und by tage widersprechin" (Weisl, 49); "Si quis rem suam obligaverit [hypothec] cuicunque, et denuo illam alteri vendiderit, et emptor ipsam, ante faciem ejus cui obligata fuerit, anno uno expleto possederit, valeat movere; quoniam neglecteri ejus rite deputabitur, quod emptorem infra tot spatium exinde

of personalty was also allowable;[1] though perhaps not until a late period.[2]

f. The debtor who gave a hypothec could not, by primitive law during its life give another one to a third person.[3] This is a notable feature of other systems of law, and it seems to be explainable on only one theory, viz. that since the *res* has been dedicated specifically as contingent payment for a possible default, and since (as we have just seen) the creditor-pledgee obtains a title to it pursuable in the hands of a third person, and since on default the pledgee will obtain the whole *res* as the equivalent of his claim, *regardless of any surplus value* that may exist, it is impossible to conceive of any other creditor as having a concurrent interest in that *res*. In short, this well-proven rule is not only consistent with, but is the inevitable consequence of the fundamental forfeit-idea in the *wed* or *satzung*.

2. The hypothec, then, being originally in legal nature nothing but a form of *wed* or *satzung* in which the pledgee was not given possession, what were the circumstances to which this form of *satzung* would be appropriate? Why and when would this form be used instead of the other? The answer has already been pointed out, viz., wherever the existence of a claim is not yet certain, i. e. a default is only contingent. The chief cases of this sort, as enumerated by Heusler (147) are: (1) Warranty of title in a sale of land; (2) Rent from a lessee or other rent-grantor;

appellare contempsit" (Kohler, 24); "Si quis cautionem fecit et non ei obligaverit . . . [not specifically, but merely hypothecating his whole estate, then if one *res* is sold to a third person,] habeat ipse qui eas emit; nam si obligatae fuerint nominativae [specifically], non eas possit vindere, dum ipsam cautionem non sanaverit [paid]"; then the commentary to this edict warningly adds: "ita obliget, 'ut eas [*res*], donec redimantur, alienare non possit, creditori proprias factas, si statuto tempore redemptae non fuerint,'" (Val de Lièvre, 206,) i. e. the *res* must be expressly declared to be the creditor's ("proprias") in case of a general hypothec.

[1] Meibom, 411, 415; Neumann, 197. But it was not known in Sweden: Amira, I, 216.

[2] Heusler, II, 201.

[3] Meibom, 429; Stobbe, Priv. 274, 283; Amira, II, § 23 (in Iceland the pledgee might take possession immediately upon the pledgor's transferring to the third person); Kohler, 23. A later but transitional stage is seen in the rule that a second could be given only for the surplus-amount over the first; but as soon as the forfeit-idea disappears, and the pure notion of collateral security becomes established, it is perceived that any number of creditors are welcome to take their chances with the *res*, even though their united claims exceed its value; and so we find (Stobbe, 283) the codifications of the 1500's providing expressly that additional hypothecs are allowable.

(3) Liability of a debtor to a surety for possible default; (4) Liability of a guardian on account of an infant's revocation of a sale at majority, of a husband for a wife's claim of dower in property sold, and the like. In such cases, as Heusler remarks, "it would be unreasonable to make a *satzung* which would transfer the enjoyment of the property immediately to the creditor, for that would be wholly unnecessary and quite beyond what the creditor could have any pretext for demanding." The *res* was to be the *wed, if* there should be a default; but as there might not be any default, it was enough assurance for him to have the *res* legally dedicated in advance to cover that default, while remaining in the meantime in the obligor's hands. This explanation is not only *a priori* wholly natural and harmonious with the forfeit idea; but it is corroborated by the circumstance that the hypothec-documents of the Middle Ages are commonly given for just such contingent liabilities,[1] and those that are not may be explained as belonging to a later stage. A further consistency and probability appears in the fact that, in this law[2] as in others, the first hypothecs which the law establishes independently of agreement seem to be that of the landlord for rent and that of the wife for the return of the *dos*, i. e. purely contingent defaults; and it seems entirely probable that these first came into this recognition by having been universally provided for by agreement, and finally received as settled custom.[3]

[1] Thévenin, Textes relatifs aux institutions privées, I, no. 22 (for a guaranty of rent); Amira, I, 639 (relatives of S., who injured a monastery, agree to give their land to the monks *in perpetuo*, "if the said S. does them harm again"); II, § 27 (by a husband giving the wife a hypothec on the husband's other land as security for the *dos*, which was returnable on divorce or death; by a guardian for dealings with the ward's property; by a debtor to a surety on a debt; but chiefly by a grantor to the grantee as security against a failure of title or a defect of area).

[2] Amira, II, § 28.

[3] Another piece of evidence of minor consequence (but worth while noticing because it reappears in Roman law) is this. The debtor could keep possession (since that was what was desired) of the *res* by giving the ordinary *wed* with livery to the pledgee, and then receiving it back on lease (Neumann, 197; Amira, II, 246). Now for ordinary claims, already due, this would have been amply sufficient; the creditor took the *res* in payment, and reaped a profit by letting the pledgor cultivate as tenant, just as he might have done to a third person. With this expedient as a possible one, there would have been no motive for resorting to the hypothec form as above described; i. e. if mere possession by the debtor was the object, based on convenience or on the creditor's confidence in the debtor, or on some other motive than the one above stated, why was not the livery-pledge with lease back to the pledgor the simple and sufficient method? This method clearly was understood, and yet it was not commonly resorted to. The theory of contingent default is the only one that explains the presence side by side of these two modes of debtor's possession-pledge; for clearly

3. What became of the hypothec in Germanic law? Here we come into the complicated learning about rents. The difference in principle and in history between an interest-bearing debt for which a *res* in the debtor's possession is security, and a periodical payment to be obtained from the proceeds of a given *res*, has been the theme of many competing theories. The problem is a much more difficult one in French than in Germanic law, for the canonical prohibition of interest developed in the former region many varieties of rents formed for the express purpose of lending money on interest. The exact process, however, by which the ordinary specific hypothec of the Middle Ages developed into its modern varieties does not have a necessary bearing on its origin as a species of *wed*. It is enough to note here that both Newmann and Heusler agree on a theory which is entirely consistent with the originally contingent purpose and specific limitation of the hypothec.[1] When the charging of a rent upon one's land became, for economic reasons (Heusler, I, 335), a popular practice, — in Germany, say in the 1200's — the expedient which the farmer-landlords (as above described) commonly resorted to, the hypothec, became soon equally popular; the rent from one piece was secured by another piece of land, contingently on default in the rent; and soon the rent-grantor merely gave a general hypothec on all his property ("liegenden und fahrenden," "in dorf und in hus, in feld und in stadt"); still later, the rent issues out of all his property, without discrimination between the parts primarily and subsidiarily liable; and finally turns into a mere personal liability of the rent-grantor with a *res*-incumbrance indistinguishable from an ordinary general hypothec. Thus comes about an ultimate generic type of collateral security with all the complexity of its modern varieties.

[*To be continued.*]

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the livery with re-lease was *not* suited to the case of contingent liability (as giving the creditor what he had yet no claim to), while the hypothec form as above described (the postponed *satzung*) *was* suited to just the case of a contingent liability.

[1] Heusler, II, § 105; Neumann, 213, 243.